# In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1763

HELEN LEWANDOWSKI; BILL J. HEDRICK; M. M. MILLER, on behalf of themselves and others similarly situated,

*Petitioners,*

vs.

JOHN C. DANFORTH, Attorney General for the State of Missouri,

*Respondent.*

## PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MISSOURI

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## PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MISSOURI

Petitioners pray that a Writ of Certiorari issue to review the judgment of the Supreme Court of the State of Missouri entered on March 14, 1977.

## OPINIONS BELOW

The decision of the Missouri Supreme Court is reported at 547 S.W.2d 470. It hereto appears as Appendix "A".

## JURISDICTION

The judgment of the Missouri Supreme Court was entered on March 14, 1977, and this Petition for Writ of Certiorari is being timely filed within ninety days of that date. This Court's jurisdiction is invoked pursuant to 28 U.S.C. Section 1257(3).

## QUESTIONS PRESENTED

I. THE WRIT OF CERTIORARI SHOULD BE GRANTED TO PROVIDE THE NECESSARY INTERPRETATION REGARDING THE SCOPE OF AUTHORIZED INVESTIGATIVE POWER GRANTED THE OFFICE OF THE ATTORNEY GENERAL IN THE ISSUANCE OF A CIVIL INVESTIGATIVE DEMAND.

II. THE WRIT OF CERTIORARI SHOULD ISSUE TO SHOW MISSOURI REVISED STATUTES 407.010 THROUGH 407.110, ARE, IN SUBSTANTIAL PART, REPUGNANT TO THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

III. THE WRIT OF CERTIORARI SHOULD BE GRANTED TO SHOW MISSOURI STATE ACTION DENIED PETITIONERS RIGHTFUL ACCESS TO THE COURTS IN SEEKING REDRESS FOR A VALID CAUSE OF ACTION IN TRYING TO PREVENT THE WRONGFUL INVASION BY THE STATE OF A VALID AND CONSTITUTIONALLY PROTECTED PROPERTY RIGHT.



## STATEMENT OF THE CASE

This case involves the use by the Attorney General of Missouri of a Civil Investigative Demand (CID) in connection with an investigation of a "lonely hearts" operation.

### Parties

Helen Lewandowski, Bill J. Hedrick and M. M. Miller, Petitioners here, were the Plaintiffs below. They operated a mail-order "lonely hearts" correspondence service known as Pen Pals.

The Respondent here as below is the Attorney General of the State of Missouri (AG).

### Nature of the Case

The AG issued a CID to Pen Pals to produce certain information. The Petitioners filed their petition to allow such production only after a hearing by the Circuit Court of Jackson County, Missouri. The latter Court refused to grant a hearing and dismissed their petition. Upon appeal, the Supreme Court of Missouri affirmed the Trial Court.

### Civil Demand

Under a return date of November 17, 1975, the AG issued his "Civil Investigative Demand" to each of the three individuals. The demand sought:

(1) Number of solicitations mailed to Missouri residents since January 1, 1975, the number who enrolled for a special offer, and the names and actual number nation-

wide who had formed "strong and romantic attachments" and had married,

(2) The gross income, costs, salaries, wages and profits of all employees and owners,

(3) A list of names, addresses and phone numbers of all Missouri residents who had joined Pen Pals since January 1, 1975, and

(4) A list of names and addresses of all employees of Pen Pals since January 1, 1975.

This demand was asserted under the alleged scope of Sections 407.040 et seq. V.A.M.S.

**Alleged Misrepresentations**

The demand also stated that Pen Pals was misrepresenting itself as a non-profit organization and had misrepresented the possibility of forming "strong and romantic" attachments through its services.

**Offer**

Pen Pals immediately advised the AG that they had no intention of misusing the term "non-profit organization" and meant they were not operating profitably. Pen Pals stated it would cease using such phrase.

**Rejection**

The offer of Pen Pals was rejected and under date of November 5, 1975, it was ordered to "cease doing business in the State of Missouri."



**Confidential**

The remaining information sought by the AG was denied by Pen Pals, believing that it was confidential, and they should not be required to produce it, except upon order of the Court pursuant to Section 407.060 V.A.M.S.

Pen Pals also took the position that the costs of operations and profits were not indicia of fraud or misrepresentation and would be confidential.

It was also asserted that the membership lists were "trade secrets" and that the names of nationwide members were of no concern to the AG.

**Five Couples Married**

However, Pen Pals did furnish the names of five residents of Missouri who had married as the result of Pen Pals' activity.

**Petition**

Pen Pals sought relief in the Trial Court alleging the confidentiality of its records and the violation of the constitutional rights of the Petitioners and their clients.

The Trial Court dismissed the petition without hearing, and the Missouri Supreme Court affirmed such action. The latter Court held that the statutes involved afforded sufficient procedural due process and that Petitioners had no cause at this time.

## REASONS FOR GRANTING THE WRIT

### I.

**A Writ of Certiorari Should Be Granted to Provide the Necessary Interpretation Regarding the Scope of Authorized Investigative Power Granted the Office of the Attorney General in the Issuance of a Civil Investigative Demand.**

The scope of the civil investigative demand (CID) has never been considered in Missouri courts. There are two decisions on the subject to date: The instant case, and *State ex rel. Danforth* v. *Independence Dodge, Inc.*, 494 S.W.2d 362 (Mo. App. 1973). In the latter case, a court hearing was given as to the validity of the CID, but the Court did not think it necessary to rule on the authority and scope of the CID. In the instant case, the Court disposes of this question by acknowledging the lack of judicial attention given to the Missouri statute and bases its decision on what it considers the "best available authority" (*Lewandowski* v. *Danforth*, 547 S.W.2d 470, 472). This authority is the similar CID authorized in the Federal Antitrust Civil Process Act found at 15 U.S.C. Sec. 1312. These provisions concerning the Federal CID have received judicial attention from several circuits. However, the United States Supreme Court has not reviewed them. Although the general design and purposes of the Missouri and Federal CID statutes are similar, the great differences between the two statutes render the use of the Federal as a basis for a decision on the Missouri quite inept, as will be shown further. The Missouri statute must be interpreted according to its own verbiage and delineations.



This is a question of first instance and is not a matter solely of Missouri interest. This statute, and the CID statutes of other states, must be construed and limited by the context of the United States Constitution. As the scope of the Missouri statute has never been given specific judicial attention, it is of great importance that these statutes be looked to at this time to prevent the expansion of the authority by all States under a CID into areas of protected interests and rights. Section 407.040.3(2) V.A.M.S. disallows any demand for privileged information. Yet in the instant case the Court has declared a petition for dismissal of a CID on the grounds that it requires privileged information insufficient to form a cause of action! Because of such occurrences, and those likely to continue to occur, these statutes need specific and limiting construction by the courts, for which this Court's attention is greatly demanded.

### II.

**The Writ of Certiorari Should Issue to Show Missouri Revised Statutes 407.010 Through 407.110, Are, in Substantial Part, Repugnant to the Due Process Clause of the Fourteenth Amendment to the United States Constitution.**

The Missouri statutes pertaining to General Merchandising Practices, and the civil investigative demand authorized therein, pose a threat to property rights guaranteed every citizen by the Fourteenth Amendment to the United States Constitution, where it is stated that no State shall "deprive any person of life, liberty, or property, without due process of law." The protections that need be given to satisfy this due process requirement depend upon the

circumstance of each case, as per the severity of the property right in question.

In the instant case, the State seeks to compel production of information privileged to the Petitioners and their business interests, and information which could adversely affect the lives of many innocent people. Yet the State is neither required to provide a hearing as to the merits of these interests nor to prove valid grounds upon which its allegations are based. The due process protection thus provided certainly falls short of that required by the interests involved.

It has been held that the Missouri CID procedure is a discovery device solely for the benefit of the Attorney General (*State ex rel. Danforth* v. *Independence Dodge, Inc.*, 494 S.W.2d 362, 363) which leaves the protection of the citizen to the wind. This cannot be allowed under the United States Constitution. The statutes must either be rewritten or by judicial construction be sufficiently limited to provide the proper due process protection.

This protection cannot be provided without specific attention drawn to the Missouri Statutes themselves. As the Missouri Supreme Court noted, virtually no judicial attention has been thus directed. The Court then goes ahead to base its decision upon similarities between the Missouri Statutes and the Federal CID provision in 15 U.S.C. Sec. 1312. The provisions of the Federal CID have invariably been upheld and strengthened (see generally 10 A.L.R. Fed. 677). The reasons behind such stout judicial backing are readily apparent upon looking at the provisions of the Federal statutes. The provisions of the Act *provide the necessary procedural safeguards to protect the property interests* of the person or corporation upon whom the



CID is served, making the CID under these circumstances a valid and valuable tool in the exercise of Federal investigative power. An analyzation and comparison between the verbiage and delineated scope of authority granted under the Federal and Missouri CID statutes amply illustrates both the ineptness of a Missouri decision based on the Federal similarities, and the validity of the Federal statute as compared to the unconstitutionality of the Missouri provisions.

The Federal statute in 15 U.S.C. Sec. 1312 specifically limits the scope of the CID to matters concerning civil antitrust investigations. The Missouri statute is worded so that any person under investigation may be served with a CID if the Attorney General has reason to believe he is in possession of documents relevant to the investigation. The Missouri statute does not include the idea of the CID used primarily *after* an investigation has begun, but allows the CID to be used as a "fishing" device.

The scope of the authority under which a CID may be issued is much broader than the Federal limitation to antitrust violations, also. The only limitation on the Office of the Attorney General is that it must have reason to believe the party upon whom the CID is served is engaging in or has engaged in practices declared to be unlawful under the general merchandising provisions. These include fraud, misrepresentation, or any method, act or practice deemed to be against the public interest.

Such a broad basis allows the Attorney General to decide for himself without judge or jury what acts constitute an unlawful violation, rather than leaving that determination to the courts as it should be. Unless a court hearing is *required*, this provision allows the Attorney

General to declare a person or business, along with its reputation, a thing so difficult to re-establish, *guilty until proven innocent* (15 U.S.C. 1312(b)(1); 407.040.1 V.A.M.S.).

Secondly, the Federal statute *requires the CID to contain a statement of the nature of the conduct which constitutes the alleged violation.* The Missouri statute, on the other hand, requires only that the alleged violation be stated—it need not give the grounds upon which belief of the alleged violation is based, nor the nature of the conduct which comprises the alleged violation. It only needs to state the alleged violation and the subject matter of the investigation. This allows the Attorney General in Missouri to instigate an investigation by the use of the CID without having any substantial basis. This creates a very one-sided process by which the Attorney General is authorized to obtain information on the merest suspicions alone (15 U.S.C. 1312(a); 407.040.2 V.A.M.S.).

Third, both statutes have guidelines regarding the type of material which may be demanded under the CID, using the boundary as anything that would be considered reasonable or proper if demanded in a subpoena ducas tecum. This is a most flexible and irregular standard, if one at all, as it forces the courts to look to case law and prior decisions as applied to the case at hand. The Federal provision goes ahead to apply the protections available under the Federal Rules of Civil Procedure (particularly the protective orders of FRCP 26(c)) to any CID that might be issued. Thus, the person upon whom it is served has a definite recourse that the courts may easily and specifically apply. The Missouri statute, deleting the exactitude of this latter protection, allows too much flexibility in an area where specific protection is so greatly demanded. It reduces the protection to an inefficient guessing game



where a citizen's property rights are at stake (15 U.S.C. 1314(b)).

Fourth, and a matter of the greatest importance, is the total lack of guidelines in the Missouri provision for the modification or setting aside of an improper CID. 407.070 V.A.M.S. states that a CID may be set aside or modified upon a showing of good cause. This is a valid criteria, yet it allows many CID's to slip by. The Federal statute provides much more specific bases for modification. Any such petition may be based on any failure of the demand to follow the provision of the Act, or upon any constitutional right or any legal right or privilege of the person upon whom the demand is served. In the instant case, the petition was based on the unconstitutionality of the demand for privileged information. Yet the cause of action was denied before it was even allowed a full court hearing. By so denying the petition, the Court has, in essence, denied the Petitioners rightful access to the courts, denying them the opportunity to be heard, and thus denying them the right to ask for modification in the first place. This circuitous route, although it looks on the surface to provide ample opportunity to modify and thus provide ample procedural due process, in effect, provides neither of these protections. The Petitioners are forced to give up their property without their rightful opportunities as provided for in the Fourteenth Amendment's due process clause. Clearly, under the Federal statute, the right to present such complaints is more secured, and a trial on the merits of the complaint more likely (15 U.S.C. 1314(b); 407.070 V.A.M.S.).

Fifth, one of the chief concerns of any person or corporation forced to give information under the CID is the possibility of unnecessary divulgence. The Missouri stat-

ute allows the material to be seen by any authorized member of the Attorney General's staff, as does the Federal provision. However, it includes no provision concerning limitations as to what action it may be produced in as evidence, nor the time the information must be returned to the person who produced the evidence. The only limitation is that, before the introduction of trade secrets into court, there must be a hearing provided. The protection afforded in this area is little more than slight. After the information is already in the hands of the Attorney General, it may find its way into trial evidence easily by inference, implication or mistake. The protection can only be validly afforded at the initial stages of the CID. However, once the information is validly in the hands of the Attorney General, protection must also be taken in restricting the use of the material to the litigation resulting from the investigation at hand. Upon its completion (or in case it is never pursued), a guaranteed return of the information must be afforded the person who produced the material. The Missouri statute lacks both of these protections.

Sixth, the Missouri statute has a punishment provision allowing a $500.00 fine, or one year in jail, or both, for noncompliance with the order. The issuance of a CID requires no court order. Yet, such a punishment provision puts a citizen or corporation in jeopardy of a fine or jail sentence for perhaps trying only to protect what is his constitutionally and legally. The Federal statute has no parallel punishment provision, but allows the Attorney General only to seek a court order compelling discovery. Upon disregard of that order, the Court may impose the punishments in accordance with contempt in disobeying a court order. This type of punishment is



clearly in line with constitutional objectives and our court system. The Missouri penalty is not only too severe, but may be imposed by the office of the Attorney General with subsequent conviction. This idea goes back to the previously mentioned reversal of the American maxim of innocent until proven guilty!

The above-mentioned deficiencies illustrate the reasons for the strength of the Federal statutes, and show their inapplicability to decisions on the Missouri CID. The Federal statute provides the necessary procedural safeguards to an exercise of Federal investigations. However, the Missouri statutes do not sufficiently limit the power of the CID. When the State can assert its police power in the form of these investigations, by its own authority, solely for its own benefit, and without sufficient safeguard for the person upon whom the demand is served, it has gone beyond the due process limitations, and must be limited.

The Missouri statutes also ignore the individuals behind the information required. In the instant case, the information sought concerns the romantic aspirations of many persons. Should this information be released, it could be ruinous. This inquiry forcing divulgence by Pen Pals, which promised confidentiality, intrudes upon its client's right to privacy and has a chilling effect on their associations. If the citizen cannot rely on the confidentiality of information given, it will prevent him from freely associating with such organizations. This, again, is a constitutionally protected interest that was not afforded protection and enforcement by the Missouri Courts, and judicial interpretation must be applied to the statutes to insure this protection.

III.

**The Writ Should Be Granted to Show Missouri State Action Denied Petitioners Rightful Access to the Courts in Seeking Redress for a Valid Cause of Action in Trying to Prevent the Wrongful Invasion by the State of a Valid and Constitutionally Protected Property Right.**

There seems to be little argument but that seeking the names and addresses of members is seeking the customer lists of Pen Pals. And, those names are protectible under Missouri law as Trade Secrets.

The earliest case we found was *Reilly Optical Co.* v. *Burke*, (St.L. C/A, 1931) 41 S.W.2d 909. As held by that court at l.c. 911 the "lists of customers" was "regarded as confidential" and a right to injunction exists. (N.B. No such right exists under Chapter 407.010 et seq.)

We next find Missouri Supreme Court Division No. 1 in *Clark-Lami, Inc.* v. *Cord*, (1969) 440 S.W.2d 737 holding that "customer lists" are confidential and can be protected by injunction. (Again, not a relief available in the instant case.)

Next, we examine *National Rejectors, Inc.* v. *Trieman, et al.*, (1966) 409 S.W.2d 1, where the Missouri Supreme Court *en banc* accepted for Missouri Section 757(b) *Restatement of Torts* WHICH DEFINES "trade secrets" in the following manner:

> "b. Definition of trade secret. *A trade secret may consist of* any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage



> over competitors who do not know or use it. It may be a formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, OR A LIST OF CUSTOMERS." (Emphasis supplied)

There can simply be NO DOUBT that in the sovereign State of Missouri listings of customers constitute TRADE SECRETS.

The classic statement of the rule respecting sufficiency of a petition is found in *Conley* v. *Gibson*, (1957) 355 U.S. 41, 45, 78 S.Ct. 99, 102, 2 L.Ed.2d 80, 84:

> "In appraising the sufficiency of the complaint we follow, of course, the accepted rule that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief."

The question of WHY Pen Pals seeks so diligently to protect its "customer lists" can only be answered upon trial. Neither this office, nor this Court may resort to conjecture as to WHY. However, a logical reason is the ultimate and promiscuous use of such lists by the AG in subsequent judicial proceedings open to the Press and Public!

This Court in its wisdom will undoubtedly take judicial notice of the frailties of humans and we so invite you. Having done so, it is not too difficult to surmise that in the case of Mrs. Ima Hog (no relation to the old Texas Governor - - - and a pure fabrication) she may have secret desires to correspond with members of the opposite sex in Missouri and other states. Mrs. Hog may not care

for her husband (Ura Hog) to know of this propensity. The revelation of her name in a judicial proceeding could easily result in a dissolution, bloodshed, or maybe just a little old-fashioned wife beating.

The point we struggle to make is that Pen Pals has no license from its customers to reveal their names except in the manner of business operations.

For brevity's sake, Pen Pals take the position that the unhampered power of the AG to ruin a business reputation by a civil investigative demand and require the production of evidence (free of all limitations) offends our traditional concepts of constitutional rights and due process.

The AG (regardless of party, race, nationalistic origin or background) appears to be a normal human being subject to the problems of mankind. He is clothed with no supernatural powers exceeding that of the judiciary and in the end result is only the lawyer for the State of Missouri.

YET, the Missouri Legislature has attempted to cloak the AG with the famed black cape of Zorro, including his trusty sword, so that the AG can in one fell swoop toss a judge, a jury and the defendants into the trashheap!

ONCE the AG gets his hands on the "documentary material, information or PHYSICAL EVIDENCE", he is authorized to use the same "IN THE ENFORCEMENT OF SECTIONS 407.010 TO 407.130 BY PRESENTATION BEFORE ANY COURT!!!!!" (407.060).

AND, the only possible limitation is in regard to "trade secrets"!!



The AG contended before the Trial Court that the Merchandising Practices Act did not provide for anything but dollar penalties. However, our reading of Section 407.080 indicates to the contrary. It provides:

> "* * * (U)pon conviction, *shall be punished by a fine not to exceed five hundred dollars or by confinement in the county jail for a term not to exceed one year, or by both such fine and confinement.* The attorney general shall enforce the provisions of this section." (Emphasis supplied)

So, it is clear that this Act is not just another pretty face - - - it is a JAILER up to one year and/or $500.00 as well as a $5,000.00 penalty for violation of any injunction. See 407.110 V.A.M.S.

It would seem fairly well-settled law that a one year stretch for anyone should be considered as a criminal punishment even if denominated as a misdemeanor.

**All Rules Violated**

The AG as it now stands can demand and receive anything he wants with absolutely nothing to stop him. Pen Pals by the Trial Court's action were denied the traditional protection of Missouri's Civil Rule 56.01(c) relating to protective orders.

Learned Judges of the Kansas City Appellate Court in *State of Missouri ex rel. Danforth* v. *Independence Dodge, Inc.*, (1973) 494 S.W.2d 362, held at l.c. 366:

> "The purpose of the Civil Investigative Demand procedure is to PROVIDE a form of PRETRIAL DISCOVERY for the BENEFIT of the ATTORNEY GENERAL." (Emphasis supplied)

WHERE, Dame Justice, do we find anything for the BENEFIT of Pen Pals or their protection? (AND, note that a trial on the merits was had in the cited case!!)

The Court in *Independence Dodge,* supra, likened the Civil Investigative Demand to the AG's powers under Section 416.300 V.A.M.S. covering the examination of witnesses under anti-trust procedures. BUT, please note the provisions of Section 416.310 (416.300 and .310 both being repealed) which provided that the AG had to seek an Order from a Justice of this Supreme Court before he could proceed.

**Infuriating**

In considering this cause, will this Court please put its collective self in the shoes of Pen Pals and read the AG's Civil Investigative Demand? It is an insult to businessmen and women who receive it as plainly shown in the second paragraph thereof reading as follows:

> "The Attorney General has reason to believe that *Pen Pals International has used fraud, deception or misrepresentation* in connection with the sale and advertisement of the above goods and services including, but not limited to, misrepresentation of the enterprise as a non-profit organization, and misrepresentation of the possibility of forming 'strong and romantic' attachments through referrals by Pen Pals International. The Attorney General believes you have information, documentary material or physical evidence relevant to the above mentioned suspected violations."

WHY would any AG find it necessary to ACCUSE without evidence Pen Pals or any other businessmen or



women of fraud, deception or misrepresentation? This type of conduct by any AG tends to get one's "Irish up!"

The Legislative, Judicial and Executive arms of our State and National governments should never put themselves into situations where the vast hordes of honest business people are vilified by the actions of a few. Yet, that is exactly what the AG's demand does!

**What About Due Process**

Like the sands of the seas, there are many grains to the consideration of what constitutes compliance with constitutional due process. As the U.S. Supreme Court held in *Cafeteria and Restaurant Workers Union* v. *McElroy,* 367 U.S. 886, 81 S.Ct. 1743, 6 L.Ed.2d 1230, 1236:

> "The very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation. * * * '(D)ue process unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances.' It is 'compounded of HISTORY, REASON, the past course of decisions.' " (Emphasis supplied)

But, as the Eighth Circuit Court of Appeals held in *DeChamplain* v. *Lovelace,* (1975) 510 F.2d 419, 426:

> "The RIGHT to be heard is *fundamental to due process.*" (Emphasis supplied)

The Eighth Circuit Court of Appeals, after a consideration of all applicable statutes and Missouri decisional law held in *Birdwell* v. *Hazelwood School District,* (1974) 491 F.2d 490, 495:

> "The 'standards of procedural due process are not wooden absolutes.' The sufficiency of the procedures must be judged in the light of the totality of the circumstances. The fundamental requirement of due process 'is the opportunity to be heard, "at a meaningful time and in a meaningful manner", * * * This opportunity must be 'appropriate to the nature of the case.' * * *".

In the instant case, the statutes under fire are totally without protection for the accused and as proven in this case, the Trial Court failed to lift his shield of justice in protection.

If there is any doubt as to the applicability of the Federal Constitution, we hasten to dispel that thought by reference to *Belk* v. *Chancellor of Washington University*, D.C. E.D. Mo. 1970, 336 F. Supp. 45, holding that the Fourteenth Amendment encompasses action by "state officials." As well as Missouri Supreme Court's *en banc* opinion in *GEM Stores, Inc.* v. *O'Brien*, (1963) 374 S.W.2d 109, 117 that:

> "The constitutional requirements of due process and equal protection of the laws as interpreted by the Supreme Court of the United States are binding on this court. Nevertheless, decisions of this state are in harmony with the federal cases."

**No Hearing**

In the case of Pen Pals, no hearing was held in connection with the AG's summary Civil Investigative Demand and obviously no hearing by the Trial Court on the merits. This runs contra to the law of this land as expressed by the U. S. Supreme Court in *Goldberg* v. *Kelly, et al.*,



(1970) 397 U.S. 254, 90 S.Ct. 1011, 25 L.Ed.2d 287. The *Kelly* case involved the termination of welfare benefits without a hearing and upon a 7 day notice. The Supreme Court remarked that it was not prepared to say if only 7 days notice was *constitutionally insufficient per se* "although there may be cases where fairness would require that a longer time be given." (l.c. 299, 25 L.Ed.2d).

The Supreme Court then continued in *Kelly* at l.c. 299 holding:

> "The opportunity to be heard MUST BE TAILORED to the capacities and circumstances of those who are to be heard." (Emphasis supplied)

And went on at l.c. 300 to opine from an earlier decision:

> "Certain principles have remained relatively immutable in our jurisprudence. One of these is that where governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue. While this is important in the case of documentary evidence, it is even more important where the evidence consists of the testimony of individuals whose memory might be faulty or who, in fact, might be perjurers or persons motivated by malice, vindictiveness, intolerance, prejudice, or jealousy. We have formalized these protections in the requirements of confrontation and cross-examination. They have ancient roots. They find expression in the Sixth Amendment . . . This Court has been zealous to protect these rights from erosion. It has spoken out not only in criminal cases, . . .

but also in all types of cases where administrative . . . actions were under scrutiny."

We admit the latter case covers a broader front than we now seek but it is an excellent restatement of what "due process is all about".

## CONCLUSION

Petitioners believe a more detailed treatment of this case is necessitated by the grave constitutional problems in the Missouri Revised Statutes 407.010 through 407.110. Judicial interpretation is required to delineate the boundaries of investigative authority, and to establish Petitioners' grounds for dismissal of the CID as a valid cause of action.

Respectfully submitted,

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# APPENDIX

## APPENDIX "A"

Helen LEWANDOWSKI et al.,
Appellants,

**v.**

John C. DANFORTH, Attorney General,
State of Missouri, Respondent.

No. 59509.

Supreme Court of Missouri,
en banc.

March 14, 1977.

DONNELLY, Judge.

In this cause, the constitutionality of § 407.040, RSMo Supp.1973, is questioned. It reads as follows:

"1. When it appears to the attorney general that a person has engaged in or is engaging in any act or practice declared to be unlawful by sections 407.010 to 407.130 or when he believes it to be in the public interest that an investigation should be made to ascertain whether a person in fact has engaged in or is engaging in any such act or practice, he may execute in writing and cause to be served upon any person who is believed to have information, documentary material, or physical evidence relevant to the alleged or suspected violation, an investigative demand requiring such person to appear and testify, or to produce relevant documentary material or physical evidence for examination, at such reasonable time and

place as may be stated in the investigative demand, concerning the advertisement, sale or offering for sale of any goods or services or the conduct of any trade or commerce that is the subject matter of the investigation; except that, this section shall not be applicable to criminal proceedings.

"2. Each civil investigative demand shall

"(1) State the statute and section thereof, the alleged violation of which is under investigation, and the general subject matter of the investigation;

"(2) Describe the class or classes of information, documentary material, or physical evidence to be produced thereunder with reasonable specificity so as fairly to indicate the material demanded;

"(3) Prescribe a return date within which the information, documentary material, or physical evidence is to be produced; and

"(4) Identify the members of the attorney general's staff to whom such information, documentary material, or physical evidence is to be made available.

"3. No civil investigative demand shall:

"(1) Contain any requirement which would be unreasonable or improper if contained in a subpoena duces tecum issued by a court of this state; or

"(2) Require the disclosure of any documentary material which would be privileged, or which for any other reason would not be required by a subpoena duces tecum issued by a court of this state.



"4. Service of any civil investigative demand, notice, or subpoena may be made by:

"(1) Delivering a duly executed copy thereof to the person to be served or to a partner or to any officer or agent authorized by appointment or by law to receive service of process on behalf of such person;

"(2) Delivering a duly executed copy thereof to the principal place of business in this state of the person to be served; or

"(3) Mailing by registered or certified mail a duly executed copy thereof addressed to the person to be served at the principal place of business in this state or, if said person has no place of business in this state, to his principal office or place of business;

"(4) The mailing thereof by registered mail, requesting a return receipt signed by the addressee only, to the last known place of business, residence or abode within or without this state of such person for whom the same is intended."

Appellants, the principals of Pen Pals International (PPI), instituted this proceeding by filing in the Circuit Court of Jackson County a Petition to Set Aside the Civil Investigative Demand (CID) issued by Respondent, the Attorney General of Missouri. The CID called for production by appellants of:

1. the actual number of solicitations mailed by PPI to Missourians since January 1, 1975;

2. the number of State residents who enrolled with PPI under the "half price discount offer";

3. the names of members across the nation who are known by PPI to have formed "strong and romantic attachments" and "marriages" that resulted from associations formed through PPI;

4. a gross income and cost statement, including the salaries, wages and profits of all employees and owners;

5. a list of names, addresses and phone numbers of all Missourians who have joined PPI since January 1, 1975;

6. a list of the names and addresses of all employees, past or present, of PPI since January 1, 1975.

The information sought by Respondent was demanded under the authority of § 407.040, supra. Respondent claimed to believe appellants have used "fraud, deception or misrepresentation in connection with the sale and advertisement of the above goods and services including, but not limited to misrepresentation of the enterprise as a non-profit organization, and misrepresentation of the possibility of forming 'strong and romantic' attachments through referrals by Pen Pals International."

In response to appellants' petition, Respondent filed a motion to dismiss on the grounds of improper venue and because the petition failed to state a cause of action. The circuit court agreed that no cause of action was stated in the petition, and the case was dismissed without prejudice and with 20 days leave granted appellants to file an amended petition. Appellants filed a Motion to Set Aside the Court's Order which was overruled. Appeal was perfected to this Court.



Before considering the challenges to § 407.040, supra, which authorizes the Attorney General of this State to issue a CID, we note the similarity of § 407.040 to procedures in the Federal Antitrust Civil Process Act found codified at 15 U.S.C.A. § 1312. Since the Missouri CID statute has received virtually no judicial attention, the best available authority on the subject consists of federal decisions which have construed and applied the provisions of the Federal Antitrust Civil Process Act. (In *State ex rel. Danforth* v. *Independence Dodge, Inc.*, 494 S.W.2d 362, 363 (Mo.App.1973), Judge Wasserstrom noted the parallel between the federal and state laws but did not find it necessary to rule on the authority and scope of a CID). *See generally*, Annot. 10 A.L.R. Fed. 677; von Kalinowski, *Antitrust Laws and Trade Regulations*, Vol. 16L, § 93 (1976).

Appellants allege in a vague and indefinite fashion that the CID procedure denies them due process of law. An examination of § 407.040 and § 407.070 reveals that persons served with a CID are fully afforded the protection of procedural due process. In *Fuentes* v. *Shevin*, 407 U.S. 67, 80, 92 S.Ct. 1983, 1994, 32 L.Ed.2d 556 (1972) the Supreme Court said:

> "For more than a century the central meaning of procedural due process has been clear: 'Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be notified.' *Baldwin* v. *Hale*, 1 Wall. 223, 233, 68 U.S. 223, 233, 17 L.Ed. 531, 534. See *Windsor* v. *McVeigh*, 93 U.S. 274, 23 L.Ed. 914; *Hovey* v. *Elliot*, 167 U.S. 409, 17 S.Ct. 841, 42 L.Ed. 215; *Grannis* v. *Ordean*, 234 U.S. 385, 34 S.Ct. 779, 58 L.Ed.

1363. It is equally fundamental that the right to notice and opportunity to be heard 'must be granted at a meaningful time and in a meaningful manner.' *Armstrong* v. *Manzo*, 380 U.S. 545, 552, 85 S.Ct. 1187, 1191, 14 L.Ed.2d 62, 66."

Moreover, due process is not a static or rigid concept. As recognized in *Stanley* v. *Illinois*, 405 U.S. 645, 650, 92 S.Ct. 1208, 1212, 31 L.Ed.2d 551 (1972), "due process of law does not require a hearing 'in every conceivable case of government impairment of private interest.' *Cafeteria Workers* v. *McElroy*, 367 U.S. 886, 894, 81 S.Ct. 1743, 1748, 6 L.Ed.2d 1230, 1236 (1961). That case explained that '[t]he very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation' and firmly established that 'what procedures due process may require under any given set of circumstances must begin with a determination of the precise nature of the government function involved as well as of the private interest that has been affected by governmental action.' Id., at 895, 81 S.Ct., at 1748 [6 L.Ed.2d at 1236]; *Goldberg* v. *Kelly*, 397 U.S. 254, 263, 90 S.Ct. 1011, 1018, 25 L.Ed.2d 287, 296 (1970)."

Although in this instance the government function involved, that of investigation of suspect merchandising practices, is one of considerable importance to the general public, the legislature has not bestowed unbridled authority upon the Attorney General to pursue this mission at the expense of any individual's entitlement to procedural due process.

A CID issued by the Attorney General must comport with the requirements of § 407.040 which requires reasonable notice of the conduct under investigation and specific



notice of the documents to be produced. *See generally, Hyster Co.* v. *United States*, 338 F.2d 183 (9th Cir. 1964); and in *Petition of Gold Bond Stamp Co.*, 221 F.Supp. 391 (D.C.Minn.1963) *aff'd* 325 F.2d 1018 (8th Cir. 1964).

Regarding the opportunity to be heard, we must conclude procedural due process has been fully incorporated by statute within the CID process and that persons are afforded adequate notice and a meaningful opportunity to be heard. Section 407.070, RSMo Supp.1973, reads as follows:

> "At any time before the return date specified in the demand, or within twenty days after the demand has been served, whichever period is shorter, a petition to extend the return date for, or to modify or set aside the demand, stating good cause, may be filed in the circuit court of the county where the parties reside or in the circuit court of Cole county."

Appellants finally assert they should not be compelled to disclose certain information in response to the CID because such information constitutes trade secrets. The assertion is premature. It may be made at the time the Attorney General seeks to present such information before any court. § 407.060, RSMo Supp.1973.

The judgment is affirmed.

All concur.

## APPENDIX "B"

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## MISSOURI REVISED STATUTES

407.010. Definitions.—As used in sections 407.010 to 407.130, the following words and terms mean:

(1) "Advertisement" includes the attempt by publication, dissemination, solicitation or circulation to induce directly or indirectly any person to enter into any obligation or acquire any title or interest in any merchandise;

(2) "Merchandise" includes any objects, wares, goods, commodities, intangibles, real estate or services;

(3) "Person" includes any natural person or his legal representative, partnership, corporation (domestic and foreign), company, trust, business entity or association, and any agent, employee, salesman, partner, officer, director, member, stockholder, associate, trustee or cestui que trust thereof;

(4) "Sale" includes any sale, offer for sale, or attempt to sell merchandise for cash or on credit.

407.020. Unlawful practices, exceptions.—The act, use or employment by any person of any deception, fraud, false pretense, false promise, misrepresentation, or the concealment, suppression, or omission of any material fact with intent that others rely upon such concealment, suppression or omission, in connection with the sale or advertisement of any merchandise is declared to be an unlawful practice; provided, however, that:

(1) Nothing herein contained shall apply to the owner or publisher of newspapers, magazines, publications



or printed matter wherein such advertisement appears, or to the owner or operator of a radio or television station which disseminates such advertisement when the owner, publisher or operator has no knowledge of the intent, design or purpose of the advertiser; and provided, further, that nothing herein contained shall apply to any advertisement which is subject to and complies with the rules and regulations of and the statutes administered by the Federal Trade Commission;

(2) Provided further that nothing herein contained shall apply to any institution or company that is under the direction and supervision of the superintendent of savings and loan, commissioner of insurance, commissioner of finance, unless the directors of these divisions specifically request the attorney general to implement the powers of sections 407.010 to 407.130.

407.030. Assurance of voluntary compliance may be accepted, subject to approval of trial court.—In the administration of sections 407.010 to 407.130 the attorney general may accept in assurance of voluntary compliance with respect to any method, act or practice deemed to be violative of sections 407.010 to 407.130 from any person who is or has engaged in such a method, act or practice. Any such assurance shall be in writing and be filed with and subject to the approval of trial court of general jurisdiction of the county or judicial district in which the alleged violator resides or has his principal place of business, or the trial court of general jurisdiction of the county or judicial district in which the state capitol is located. Such assurance of voluntary compliance shall not be considered an admission of violation for any purpose. Matters thus closed may at any time be reopened by the attorney general for further proceedings in the public interest, pursuant to section 407.110.

407.040. Attorney general may demand production of documentary material, when—demand, contents, how made.—1. When it appears to the attorney general that a person has engaged in or is engaging in any practice declared to be unlawful by sections 407.010 to 407.130 or when he believes it to be in the public interest that an investigation should be made to ascertain whether a person in fact has engaged in or is engaging in any such practice, he may demand that any person who may be in possession, custody, or control of the original or a copy of any documentary material relevant to the subject matter of an investigation of a possible violation of sections 407.-010 to 407.130 to produce such documentary material and permit inspection and copying, provided that this section shall not be applicable to criminal proceedings.

2. Each such civil investigative demand shall:

(1) State the statute and section thereof, the alleged violation of which is under investigation, and the general subject matter of the investigation;

(2) Describe the class or classes of documentary material to be produced thereunder with reasonable specificity so as fairly to indicate the material demanded;

(3) Prescribe a return date within which the documentary material is to be produced; and

(4) Identify the members of the attorney general's staff to whom such documentary material is to be made available for inspection and copying.

3. No such civil investigative demand shall:

(1) Contain any requirement which would be unreasonable or improper if contained in a subpoena duces tecum issued by a court of this state; or



(2) Require the disclosures of any documentary material which would be privileged, or which for any other reason would not be required by a subpoena duces tecum issued by a court of this state.

4. Service of any such civil investigative demand may be made by:

(1) Delivering a duly executed copy thereof to the person to be served or to a partner or to any officer or agent authorized by appointment or by law to receive service of process on behalf of such person;

(2) Delivering a duly executed copy thereof to the principal place of business in this state of the person to be served; or

(3) Mailing by registered or certified mail a duly executed copy thereof addressed to the person to be served at the principal place of business in this state or, if said person has no place of business in this state, to his principal office or place of business;

(4) The mailing thereof by registered mail, requesting a return receipt signed by the addressee only, to the last known place of business, residence or abode within or without this state of such person for whom the same is intended.

407.050. Production of documentary material, when and where.—Documentary material demanded pursuant to the provisions of sections 407.010 to 407.130 shall be produced for inspection and copying during normal business hours at the principal office or place of business of the person served, or at such other times and places as may be agreed upon by the person served and the attorney general.

407.060. Documentary material may be copied or inspected, exceptions—trade secrets, notice.—No documentary material produced pursuant to a demand under sections 407.010 to 407.130 shall, unless otherwise ordered by a court for good cause shown, be produced for inspection or copying by, nor shall the contents thereof be disclosed to, any person other than the authorized employee of the attorney general, without the consent of the person who produced such material; provided, that under such reasonable terms and conditions as the attorney general shall prescribe, such documentary material shall be available for inspection and copying by the person who produced such material or any duly authorized representative of such person. The attorney general or any attorney designated by him may use such documentary material or copies thereof in the enforcement of sections 407.010 to 407.130, by presentation before any court; provided, that any such material which contains trade secrets shall not be presented except with the approval of the court in which the action is pending after adequate notice to the person furnishing such material.

407.070. Petitions to extend return date, modify or set aside demand, when and where filed.—At any time before the return date specified in the demand, or within twenty days after the demand has been served, whichever period is shorter, a petition to extend the return date for, or to modify or set aside the demand, stating good cause, may be filed in the trial court of general jurisdiction of the county or judicial district where the parties reside or in the trial court of general jurisdiction of the county or judicial district where the state capitol is located.

407.080. Withholding, destroying or altering documentary material, penalty.—A person upon whom a de-



mand is served pursuant to the provisions of sections 407.010 to 407.130 shall comply with the terms thereof unless otherwise provided by order of court. Any person who, with intent to avoid, evade, or prevent compliance, in whole or in part, with any civil investigative demand under sections 407.010 to 407.130, removes from any place, conceals, withholds, or destroys, mutilates, alters, or by any other means falsifies any documentary material in the possession, custody or control of any person subject of any such demand shall be guilty of an offense against the state, and shall be subject, upon conviction, to a fine not to exceed five hundred dollars or to imprisonment for a term of not more than one year, or both. It shall be the duty of the attorney general to enforce the provisions of this section.

407.090. Attorney general may request court order to produce evidentiary material—request filed where.—Whenever any person fails to comply with any civil investigative demand duly served upon him under sections 407.010 to 407.130 or whenever satisfactory copying or reproduction of any such material cannot be done and such person refuses to surrender such material, the attorney general, through such officers or attorneys as he may designate, may file, in the trial court of general jurisdiction of a county or judicial district in which such person resides, is found, or transacts business, and serve upon such person a petition for an order of such court for the enforcement of sections 407.010 to 407.130, except that if such person transacts business in more than one county or judicial district such petition shall be filed in the county or judicial district in which such person maintains his principal place of business, or in such other county or judicial district as may be agreed upon by the parties

to such petition. Whenever any petition is filed in the trial court of general jurisdiction of a county or judicial district under sections 407.010 to 407.130, such court shall have jurisdiction to hear and determine the matter so presented, and to enter such order or orders as may be required to carry into effect the provisions of sections 407.010 to 407.130. Any final order so entered shall be subject to appeal to the state supreme court. Any disobedience of any final order entered under sections 407.010 to 407.130 by any court shall be punished as a contempt thereof.

407.100. Action to obtain injunction—notice, contents. —Whenever it appears to the attorney general that a person has engaged in or is engaging in any practice declared to be unlawful by sections 407.010 to 407.130 he may, after notice to such person, if such notice can be given in the manner provided in section 407.040, seek and obtain in an action in a circuit court an injunction prohibiting such person from continuing such practices or engaging therein or doing any acts in furtherance thereof. Such notice shall state generally the relief sought and be served in accordance with section 407.050 at least three days prior to the institution of such action. If the court finds that such person has engaged in or is engaging in any practice declared to be unlawful by sections 407.010 to 407.130, it may make such orders or judgments as may be necessary to prevent the use of employment by such person of any prohibited practices, or which may be necessary to restore to any person who has suffered any ascertainable loss by reason of the use of employment of such prohibited practices any moneys or property, real or personal, which may have been acquired by means of any practice in sections 407.010 to 407.130 declared to be unlawful.



407.110. Violation of injunction, penalty.—Any person who violates the terms of an injunction issued under section 407.100 shall forfeit and pay to the state a civil penalty of not more than five thousand dollars per violation. For the purposes of this section, the trial court of general jurisdiction of a county or judicial district issuing an injunction shall retain jurisdiction, and the cause shall be continued, and in such cases the attorney general acting in the name of the state may petition for recovery of civil penalties.

407.120. Provisions of this chapter no bar to other civil actions.—The provisions of sections 407.010 to 407.130 shall not bar any civil claim against any person who has acquired any moneys or property, real or personal, by means of any practice herein declared to be unlawful.

407.130. Assessment of court costs.—In any action brought under the provisions of sections 407.010 to 407.130 the attorney general is entitled to recover costs for the use of this state; however, court costs may be assessed against a person only if the court finds that such person has willfully engaged in a prohibited practice under sections 407.010 to 407.130.

407.200. Unsolicited merchandise, how disposed of.—Where unsolicited merchandise is delivered to a person for whom it is intended, such person has a right to refuse to accept delivery of this merchandise or he may deem it to be a gift and use it or dispose of it in any manner without any obligation to the sender.

## APPENDIX "C"

### 15 U.S.C. 1311-1314

§ 1311. Definitions

For the purposes of this chapter—

(a) The term "antitrust law" includes:

(1) Each provision of law defined as one of the antitrust laws by section 12 of this title;

(2) The Federal Trade Commission Act; and

(3) Any statute enacted on and after September 19, 1962 by the Congress which prohibits, or makes available to the United States in any court of the United States any civil remedy with respect to (A) any restraint upon or monopolization of interstate or foreign trade or commerce, or (B) any unfair trade practice in or affecting such commerce;

(b) The term "antitrust order" means any final order, decree, or judgment of any court of the United States, duly entered in any case or proceeding arising under any antitrust law;

(c) The term "antitrust investigation" means any inquiry conducted by any antitrust investigator for the purpose of ascertaining whether any person is or has been engaged in any antitrust violation;

(d) The term "antitrust violation" means any act or omission in violation of any antitrust law or any antitrust order;



(e) The term "antitrust investigator" means any attorney or investigator employed by the Department of Justice who is charged with the duty of enforcing or carrying into effect any antitrust law;

(f) The term "person" means any corporation, association, partnership, or other legal entity not a natural person;

(g) The term "documentary material" includes the original or any copy of any book, record, report, memorandum, paper, communication, tabulation, chart, or other document; and

(h) The term "custodian" means the antitrust document custodian or any deputy custodian designated under section 1313(a) of this title.

§ 1312. Civil investigative demand—Issuance

(a) Whenever the Attorney General, or the Assistant Attorney General in charge of the Antitrust Division of the Department of Justice, has reason to believe that any person under investigation may be in possession, custody, or control of any documentary material relevant to a civil antitrust investigation, he may, prior to the institution of a civil or criminal proceeding thereon, issue in writing, and cause to be served upon such person a civil investigative demand requiring such person to produce such material for examination.

(b) Each such demand shall—

(1) state the nature of the conduct constituting the alleged antitrust violation which is under investigation and the provision of law applicable thereto;

(2) describe the class or classes of documentary material to be produced thereunder with such definiteness and certainty as to permit such material to be fairly identified;

(3) prescribe a return date which will provide a reasonable period of time within which the material so demanded may be assembled and made available for inspection and copying or reproduction; and

(4) identify the custodian to whom such material shall be made available.

(c) No such demand shall—

(1) contain any requirement which would be held to be unreasonable if contained in a subpena duces tecum issued by a court of the United States in aid of a grand jury investigation of such alleged antitrust violation; or

(2) require the production of any documentary evidence which would be privileged from disclosure if demanded by a subpena duces tecum issued by a court of the United States in aid of a grand jury investigation of such alleged antitrust violation.

(d) Any such demand may be served by any antitrust investigator, or by any United States marshal or deputy marshal, at any place within the territorial jurisdiction of any court of the United States.

(e) Service of any such demand or of any petition filed under section 1314 of this title may be made upon a partnership, corporation, association, or other legal entity by—



(1) delivering a duly executed copy thereof to any partner, executive officer, managing agent, or general agent thereof, or to any agent thereof authorized by appointment or by law to receive service of process on behalf of such partnership, corporation, association, or entity;

(2) delivering a duly executed copy thereof to the principal office or place of business of the partnership, corporation, association, or entity to be served; or

(3) depositing such copy in the United States mails, by registered or certified mail duly addressed to such partnership, corporation, association, or entity at its principal office or place of business.

(f) A verified return by the individual serving any such demand or petition setting forth the manner of such service shall be proof of such service. In the case of service by registered or certified mail, such return shall be accompanied by the return post office receipt of delivery of such demand.

§ 1313. Antitrust document custodian—Designation; deputy custodians

(a) The Assistant Attorney General in charge of the Antitrust Division of the Department of Justice shall designate an antitrust investigator to serve as antitrust document custodian, and such additional antitrust investigators as he shall determine from time to time to be necessary to serve as deputies to such officer.

(b) Any person upon whom any demand issued under section 1312 of this title has been duly served shall make

such material available for inspection and copying or reproduction to the custodian designated therein at the principal place of business of such person (or at such other place as such custodian and such person thereafter may agree and prescribe in writing or as the court may direct, pursuant to section 1314(d) of this title) on the return date specified in such demand (or on such later date as such custodian may prescribe in writing). Such person may upon written agreement between such person and the custodian substitute for copies of all or any part of such material originals thereof.

(c) The custodian to whom any documentary material is so delivered shall take physical possession thereof, and shall be responsible for the use made thereof and for the return thereof pursuant to this chapter. The custodian may cause the preparation of such copies of such documentary material as may be required for official use under regulations which shall be promulgated by the Attorney General. While in the possession of the custodian, no material so produced shall be available for examination, without the consent of the person who produced such material, by any individual other than a duly authorized officer, member, or employee of the Department of Justice. Under such reasonable terms and conditions as the Attorney General shall prescribe, documentary material while in the possession of the custodian shall be available for examination by the person who produced such material or any duly authorized representative of such person.

(d) Whenever any attorney has been designated to appear on behalf of the United States before any court or grand jury in any case or proceeding involving any alleged antitrust violation, the custodian may deliver to such attorney such documentary material in the possession



of the custodian as such attorney determines to be required for use in the presentation of such case or proceeding on behalf of the United States. Upon the conclusion of any such case or proceeding, such attorney shall return to the custodian any documentary material so withdrawn which has not passed into the control of such court or grand jury through the introduction thereof into the record of such case or proceeding.

(e) Upon the completion of (1) the antitrust investigation for which any documentary material was produced under this chapter, and (2) any case or proceeding arising from such investigation, the custodian shall return to the person who produced such material all such material (other than copies thereof made by the Department of Justice pursuant to subsection (c) of this section) which has not passed into the control of any court or grand jury through the introduction thereof into the record of such case or proceeding.

(f) When any documentary material has been produced by any person under this chapter for use in any antitrust investigation, and no such case or proceeding arising therefrom has been instituted within a reasonable time after completion of the examination and analysis of all evidence assembled in the course of such investigation, such person shall be entitled, upon written demand made upon the Attorney General or upon the Assistant Attorney General in charge of the Antitrust Division, to the return of all documentary material (other than copies thereof made by the Department of Justice pursuant to subsection (c) of this section) so produced by such person.

(g) In the event of the death, disability, or separation from service in the Department of Justice of the custodian

of any documentary material produced under any demand issued under this chapter, or the official relief of such custodian from responsibility for the custody and control of such material, the Assistant Attorney General in charge of the Antitrust Division shall promptly (1) designate another antitrust investigator to serve as custodian thereof, and (2) transmit notice in writing to the person who produced such material as to the identity and address of the successor so designated. Any successor so designated shall have with regard to such materials all duties and responsibilities imposed by this chapter upon his predecessor in office with regard thereto, except that he shall not be held responsible for any default or dereliction which occurred before his designation as custodian.

§ 1314. Judicial proceedings—Petition for enforcement; venue

(a) Whenever any person fails to comply with any civil investigative demand duly served upon him under section 1312 of this title or whenever satisfactory copying or reproduction of any such material cannot be done and such person refuses to surrender such material, the Attorney General, through such officers or attorneys as he may designate, may file, in the district court of the United States for any judicial district in which such person resides, is found, or transacts business, and serve upon such person a petition for an order of such court for the enforcement of this chapter, except that if such person transacts business in more than one such district such petition shall be filed in the district in which such person maintains his principal place of business, or in such other district in which such person transacts business as may be agreed upon by the parties to such petition.



(b) Within twenty days after the service of any such demand upon any person, or at any time before the return date specified in the demand, whichever period is shorter, such person may file, in the district court of the United States for the judicial district within which such person resides, is found, or transacts business, and serve upon such custodian a petition for an order of such court modifying or setting aside such demand. The time allowed for compliance with the demand in whole or in part as deemed proper and ordered by the court shall not run during the pendency of such petition in the court. Such petition shall specify each ground upon which the petitioner relies in seeking such relief, and may be based upon any failure of such demand to comply with the provisions of this chapter, or upon any constitutional or other legal right or privilege of such person.

(c) At any time during which any custodian is in custody or control of any documentary material delivered by any person in compliance with any such demand, such person may file, in the district court of the United States for the judicial district within which the office of such custodian is situated, and serve upon such custodian a petition for an order of such court requiring the performance by such custodian of any duty imposed upon him by this chapter.

(d) Whenever any petition is filed in any district court of the United States under this section, such court shall have jurisdiction to hear and determine the matter so presented, and to enter such order or orders as may be required to carry into effect the provisions of this chapter. Any final order so entered shall be subject to appeal pursuant to section 1291 of Title 28. Any disobedi-

ence of any final order entered under this section by any court shall be punished as a contempt thereof.

(e) To the extent that such rules may have application and are not inconsistent with the provisions of this chapter, the Federal Rules of Civil Procedure shall apply to any petition under this chapter.